

The manner in which food is taxed depends upon the nature of the establishment that is selling the food. See 86 Ill. Adm. Code 130.310. (This is a GIL.)

December 17, 2004

Dear Xxxxx:

This letter is in response to your letter dated September 24, 2004, in which you request information. The Department issues two types of letter rulings. Private Letter Rulings ("PLRs") are issued by the Department in response to specific taxpayer inquiries concerning the application of a tax statute or rule to a particular fact situation. A PLR is binding on the Department, but only as to the taxpayer who is the subject of the request for ruling and only to the extent the facts recited in the PLR are correct and complete. Persons seeking PLRs must comply with the procedures for PLRs found in the Department's regulations at 2 Ill. Adm. Code 1200.110. The purpose of a General Information Letter ("GIL") is to direct taxpayers to Department regulations or other sources of information regarding the topic about which they have inquired. A GIL is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120. You may access our website at www.ILTAX.com to review regulations, letter rulings and other types of information relevant to your inquiry.

The nature of your inquiry and the information you have provided require that we respond with a GIL. In your letter you have stated and made inquiry as follows:

As a service to our franchisees located within your state, ABC respectfully requests a written determination as to the proper sales tax treatment of the following items sold in ABCD restaurants:

1. Frozen Ice Cream Cakes - ABCD franchisees either make and decorate the entire cake at their restaurant or purchase a 'blank' cake from a third party vendor and simply decorate the cake prior to sale to their customers. Ice cream cakes are generally meant to be consumed by more than one person and sold for consumption off premises. Because the consumer's use of an ice cream cake is equivalent to a cake purchased at a bakery, it is ABC's position that both items be taxed the same.
2. Prepackaged Ice cream novelties - In addition to offering individual novelties, ABCD restaurants also sell prepackaged boxed novelties in groups of six. In most cases, the franchisee purchases the boxed novelties from a third party vendor; however, in some circumstances the franchisee makes their own novelties and packages those in groups of six for sales to their customers. Prepackaged novelties are also generally meant to be consumed off premises and it is ABC contention that they should be taxed similarly to prepackaged ice cream novelties sold at a grocery store.

3. **PRODUCT** - This item is similar to the ice cream cakes in that they are meant to be consumed off the premises and by more than one person. This item is created and packaged by the franchise and sold in a display case along side the ice cream cakes and frozen novelty items.

In addition to a determination on the proper sales tax treatment of each of these items, please identify the regulations supporting the states position and please specify whether or not the following factors are relevant in determining the taxability of these items:

1. The item is meant to be consumed 'off premises' and not at the restaurant
2. The item is meant to be consumed by more than one person
3. The item is manufactured by a third party
4. The item is manufactured and packaged at the restaurant
5. The item is sold as a single serving or in a package of six

Finally, we would be interested in knowing about other possible factors that may be considered in determining the taxability of these items.

If you have any questions, please give me a call.

DEPARTMENT'S RESPONSE:

General information regarding the lower (1% State) tax rate applicable to certain foods, drugs, medicines and medical appliances may be found in 86 Ill. Adm. Code 130.310. The manner in which food is taxed depends upon the nature of the establishment that is selling the food. Retailers who provide seating or facilities for on-premises consumption of food generally incur tax at the high rate (6.25% State rate) on all food sales (including bulk or grocery type items).

However, if establishments sell both food that has been prepared for immediate consumption and bulk or grocery type items and also provide facilities for on-premises consumption, the lower rate of tax may be charged on the bulk or grocery type items if the dining facilities are physically partitioned from the area where food not for immediate consumption is sold and these facilities utilize a separate means of collection of receipts. See 86 Ill. Adm. Code 130.310(b)(3).

If establishments have no seating or facilities for on-premises consumption of food, the tax rate incurred on food sales is determined by whether the majority (over 50%) are bulk or grocery type sales or are sales for immediate consumption. If more than 50% of all food sales are for immediate consumption, the retailer must charge the high rate on all food sales. If more than 50% of all food sales are bulk or grocery type items, all food sales are taxed at the low rate with the exception of hot foods, food that has been prepared for immediate consumption, alcoholic beverages, and soft drinks. See Section 130.310(a).

Food for immediate consumption is defined in the regulation as hot food and food made ready by the retailer to be eaten without substantial delay after the final stage of preparation by the retailer. See 86 Ill. Adm. Code 130.310(b)(6).

In addition to the information provided in this letter, you may wish to review Section 130.310 and the sales tax "Sunshine" letter rulings issued by the Department under the headings of 'Food' or 'Food, Drugs and Medicinal Appliances' located on the Department's internet website under the heading of "Legal Research." For example, you may wish to review Sunshine Letter ST-89-0111 that addresses a situation similar to the one set out in your letter.

I hope this information is helpful. If you require additional information, please visit our website at www.ILTAX.com or contact the Department's Taxpayer Information Division at (217) 782-3336. If you are not under audit and you wish to obtain a binding PLR regarding your fact situation, please submit a request conforming to the requirements of 2 Ill. Adm. Code 1200.110(b).

Very truly yours,

Edwin E. Boggess
Associate Counsel

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